Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

CASE NUMBER: 90-863

THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 1, 1990

SABAT QUINONES CANDELARIO,

PETITIONER

vs.

POSTMASTER GENERAL OF THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

Respectfully Submitted,

Joyce M. Siemon
Counsel of Record for Petitioner
13899 Biscayne Boulevard
Suite 209
North Miami Beach, Florida 33181
Telephone: (305) 940-6227

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

ARGUMENT 1

TABLE OF AUTHORITIES

Cromwell v. County of Sac,

94 U.S. 351 (1876) 13

Federated Department Stores, Inc. v. Moitie,

452 U.S. 392 (1981) 13

Haskins v. U.S. Department of Navy,

808 F.2d 1192 (6th Cir. 1987) . 10

Houston v. Nimmo,

670 F.2d 1375 (9thCir.1982). . . 10

Moore v. Devine,

780 F.2d 1559 (11th Cir. 1986) . 10

Pecker v. Heckler,

801 F.2d 709 (4th Cir. 1986) . . 10

REPLY BRIEF

ARGUMENT

The Response Brief to the Petition for Writ of Certiorari filed by the Postal Service did not contradict any of the facts set forth by Quinones in the Petition for Writ of Certiorari and agreed with Quinones' central contention: that "the EEOC's final decision in federal sector employment discrimination cases is binding on the employing agency," Response Brief at 9. Quinones is concerned, however, with five statements of fact and three points of argument in the Response Brief and files this Reply Brief to address them.

1. The Postal Service states, "The Postal Service issued a final agency

decision finding that petitioner's termination was not discriminatory." Response Brief at 2. While this is a true statement, Quinones would like to clarify to the Court that the Postal Service omitted to mention that in issuing its final agency decision, the Postal Service rejected the EEOC administrative judge's findings of fact from the evidentiary hearing that discrimination had occurred and his recommendation to enter the final agency decision in Quinone's favor. Had the recommendation been followed, the Postal Service would have been required to calculate a back pay remedy (which, of course, presupposes that the reasonable diligence issue would have been considered). The amount due would have

been much less than the amount due now, after so many additional years of litigation at both the administrative and court levels. If any party to this action is guilty of failure to mitigate, it is the Postal Service itself which has allowed the clock to keep running while it stubbornly and futilely fought a claim which it knew to be meritorious.

2. The Postal Service also states, "The EEOC neither considered nor determined the amount of backpay due petitioner, and the parties presented no argument or evidence on this question. See Id. at A.37." Response Brief at 2. This is not an accurate statement. What the District Court actually found was "When the present case was before the

EEOC, there was no inquiry into the reasonable diligence issue, and there was no calculation of the back pay owed to Quinones." Pet. App. A.37. There was, however, an EEOC determination that the Postal Service should compute and award an amount of back pay equal to the amount Quinones would have been paid had he not been illegally discharged from the date of that illegal discharge to the date of his reinstatement. It was that determination which Quinones went to the District Court to enforce after the Postal Service spent two years refusing to make the calculation and denying, on the grounds of failure to mitigate, that it was required to award any back pay at all. It wasn't until after the EEOC considered

all of the Postal Service's arguments on the reasonable diligence issue and found the Postal Service to be in non-compliance that Quinones brought this enforcement action in the District Court. The Postal Service ignores the fact that it refused to comply with a final decision it has conceded was binding upon it. See Pet.App. A-84.

3. "Petitoner's submissions showed that...he was a full-time university student for three years." Response Brief at 3. Quinones points out that his matriculation was actually an effort at mitigation: it was required under the Veterans Rehabilitation Program as a condition precedent to being placed in a position substantially comparable to the

one he lost at the Postal Service. This issue was raised by the Postal Service in the EEOC compliance proceedings and was found wanting. The EEOC declined to change its final order requiring the Postal Service to calculate an award of back pay from the date of illegal discharge to the date of reinstatement and found the Postal Service in non-compliance. Pet.App. A-84.

4. The Postal Service went on to state, "Petitioner submitted additional documents....Upon investigation, the Postal Sevice determined that the additional materials were suspect, and again denied petitioner's claim for back pay." Response Brief at 3. Actually, the Postal Service notified the EEOC that it

considered Quinones' documents in support of reasonable diligence suspect without any investigation or foundation at all. It was not until after Quinones commenced this enforcement action in the District Court that the Postal Service made any effort at all to investigate. After the investigation, it still could not be sworn that Quinones had not made all the job getting efforts he claimed to have made. Pet. 16. The Postal Service cannot have it both ways. It cannot, on the one hand, seek to show this Court all the arguments it raised before the EEOC in support of its decision not to comply with the EEOC order requiring it to calculate back pay, and on the other hand, seek to argue to this Court, as it does several times in

its Response Brief, that it did not have an adequate opportunity to litigate the issue of mitigation before the EEOC.

5. At paragraph 4 of the Statement of Facts, the Postal Service summarizes the 1st Circuit opinion as follows: "The court of appeals agreed with the district court that '[s]ince the EEOC acted in a judicial capacity, any factual determination that it made may be subject to the doctrine of res judicata.'...But the court observed that administrative res judicata would not apply to the EEOC proceedings 'in the face of contrary public policy,' such as 'when it would result in a 'manifest injustice' and 'would violate the statutory mandate in compliance proceedings brought before the

district court [under Section 2000e-5(g)] that 'interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." This is an admirably accurate summary of what the 1st Circuit said. The problem is two-fold. First, the Postal Service later argues that the 1st Circuit did not really hold that the doctrine of res judicata was applicable and that therefore this Court does not have to consider whether public policy and manifest injustice are exceptions to it. Response Brief at 10-11. With all due respect to our worthy opponents, that is the kind of governmental double speak from which revolutions are fomented. Once

having presented as fact that the 1st Circuit held that the doctrine of res judicata would have been applicable but for the exceptions of public policy and manifest injustice, the Postal Service cannot then argue that this Court should make believe the 1st Circuit never said it so it won't have to decide whether or not the 1st Circuit should have said it. The second problem has to do with basic error in the 1st Circuit opinion, which is propounded by the Postal Service, concerning the nature of the action brought in the District Court and the significance of Section 2000e-5(g). First of all, there is no such thing as "compliance proceedings brought before the District Court." Response Brief at 4.

Compliance proceedings occur before the EEOC. When the EEOC is unable to compel compliance, an enforcement action is brought before the District Court. Second of all, Section 2000e-5(g) does not constitute a "statutory mandate in [enforcement] proceedings brought before the District Court." Section 2000e-5(g) is a statutory mandate in de novo proceedings on the merits brought to the district courts by employees who have been unsuccessful at the EEOC. If they are then successful at the District Court in a de novo trial on the merits, the District Court must follow Section 2000e-5(g) in fashioning the remedy. Section 2000e-5(g) is not applicable to those federal employees who were successful at

the EEOC, such as Quinones, and who come to the District Court merely to enforce the remedy which has already been determined due them. Since the District Court merely has to enforce the remedy and does not have to fashion the remedy, it does not have to be concerned with Section 2000e-5(g). Quinones has never complained about the remedy fashioned by the EEOC, and therefore, the District Court did not have to comply with the Postal Service's request to review it de novo.

6. The Postal Service argues that "Because petitioner may recover the back pay he seeks on remand, interlocutory review of the court of appeals' decision is not warranted." This is rather an ingenuous argument. If Quinones thought

it was that simple, he would not have brought this petition. The truth is if Quinones could recover the back pay he seeks on remand, there would have been no point in reversing the summary judgment. Is the Postal Service stipulating that on remand it will merely repeat its stipulation as to the amount due it made at the first hearing on damages? Or is the Postal Service stipulating that even if it presents evidence on the reasonable diligence issue on remand, it will not prevail so Quinones will still get the back pay remedy he seeks on remand? What was the point of the appeal to the 1st Circuit? How does this encourage administrative efficiency or judicial economy? Or, on remand, must the District

Court hold that as the Postal Service, in the first instance, calculated that nothing was due, refuse to enforce the EEOC final decision requiring back pay to be awarded from the date of unlawful discharge to the date of reinstatement? This alternative would obviously conflict with the decisions holding that enforcement is mandatory. Haskins v. U.S. Department of Navy, 808 F.2d 1192 (6th Cir. 1987); Houston v. Nimmo, 670 F.2d 1375 (9thCir.1982); Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986); Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986). It would also negate the Postal Service's argument that Quinones could recover the back pay he seeks on remand. Or is the remand all the way back to the EEOC?

Unlike the National Labor Relations Board and the Merit Systems Protection Board, the EEOC regulations do not provide a separate stage for the resolution of back pay issues after a decision limited to the merits is issued. At the EEOC, the final decision on the merits includes a final decision on the remedy of back pay. Pet.App. A-78. This Court must review the 1st Circuit opinion in order to halt the vicious cycle of remands and never-really-final decisions which impede every federal employee's journey toward recieving a just remedy for the discriminatory wrongs done him, and in order to clarify, once and for all, what the relative duties of the federal agencies, EEOC and district courts are in

the process, so that never again does an outmanned employee like Quinones have to endure what is now twelve years of frustrating efforts to obtain justice.

7. The Postal Service also argues that the EEOC "did not resolve any disputed issues of fact concerning the amount of back pay due....[and] the proceedings before the EEOC did not afford the Postal Service an adequate opportunity to litigate the mitigation issue." Respondent's Brief at 6. This is simply not true. The EEOC made a determination that back pay was due to Quinones from the date of his unlawful discharge to the date of his reinstatement. The Postal Service had three opportunities to litigate the mitigation issue before that determination

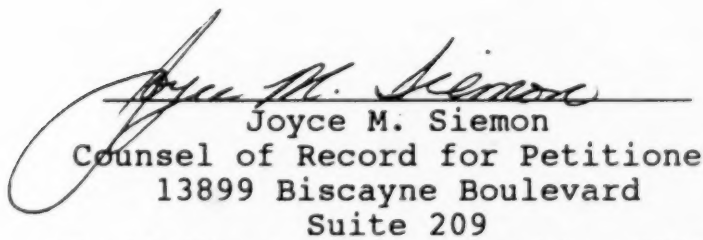
was made: at the adjustment of the complaint negotiations; during pre-hearing discovery proceedings; and at the evidentiary hearing. After the determination was made, the Postal Service had a fourth opportunity to raise the issue: by filing a motion for reconsideration. The Postal Service failed to avail itself of any of those opportunities. The Postal Service did, however, send several letters to the EEOC presenting its failure to mitigate defenses to complying with the EEOC determination. The EEOC declined to accept those defenses, declined to change its determination that Quinones should be awarded back pay from the date of unlawful discharge to the date of reinstatement,

and found the Postal Service in non-compliance. Pet.App. A-84. Because the Postal Service did have adequate opportunity to litigate the mitigation issue at the EEOC, the doctrine of res judicata clearly applied, Cromwell v. County of Sac, 94 U.S. 351 (1876), and the 1st Circuit erred in holding that public policy and manifest injustice were exceptions to it. Federated Department Stores, Inc. v. Moitie, 452 U.S. 392 (1981).

8. Lastly, the Postal Service agrees that a plaintiff is a prevailing party when he has "acheived some of the benefit sought in bringing the action." Response Brief at 11. Quinones was successful at the District Court in establishing that he

was entitled to an award of back pay and he was also successful in having the Postal Service calculate and stipulate to the amount of back pay due. As the Postal Service has stipulated in its Response Brief that on remand Quinones may recover the back pay he seeks, this Court should grant the Writ, quash the 1st Circuit opinion, and reinstate the District Court judgments awarding Quinones the stipulated amount of back pay due and the attorneys' fees awarded.

Respectfully Submitted,



Joyce M. Siemon
Counsel of Record for Petitioner
13899 Biscayne Boulevard
Suite 209
North Miami Beach, Florida 33181
Telephone: (305) 940-6227